

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-273796-D-3  
AND ALL OTHER SEAMAN'S DOCUMENTS  
Issued to: Berthall L. WINBORNE

DECISION OF THE COMMANDNAT  
UNITED STATES COAST GUARD

1869

Berthall L. WINBORNE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 25 January 1971, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as boatswain on board SS HALCYON TIGER under authority of the document above captioned, Appellant:

- (1) On 19 August 1970, at Cat Lai, RVN failed to perform his duties;
- (2) On 27 August 1970, at Vung Tau, RVN, failed to perform his duties;
- (3) on 31 August 1970, at Subic Bay, P.I., failed to perform his duties; and
- (4) on 19 September 1970, wrongfully failed to join the vessel at San Diego, California.

Appellant failed to appear at the first session of the hearing on 24 September 1970. The Examiner entered a plea of not guilty to the charge and all specifications. On the representation of the Investigating Officer that when charges were served on 21 September 1970 Appellant had stated a desire to obtain a named counsel, who already represented him in another matter, the Examiner granted an adjournment to 15 October 1970.

On that date, on reconvening, Appellant appeared. At his request, in order to obtain counsel, the Examiner adjourned to 11 January 1971. On that date, Appellant failed to appear. The hearing then proceeded in absentia.

The Investigating Officer introduced in evidence voyage

records of HALCYON TIGER.

There was no defense.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 20 March 1971. Appeal was timely filed on 10 April 1971.

#### FINDINGS OF FACT

On all dates in question, Appellant was serving as boatswain on board SS HALCYON TIGER and acting under authority of his document.

On 19 August 1970, at Cat Lai, RVN, Appellant failed to perform his duties.

On 27 August 1970, at Vung Tau, RVN, Appellant failed to perform his duties.

On 31 August 1970, at Subic Bay, P. I., Appellant failed to perform his duties.

On 19 September 1970, Appellant wrongfully failed to join the vessel at San Diego, California.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The sole basis for appeal is that on 11 January 1971 Appellant was serving aboard SS MANKATO VICTORY and so could not appear to defend himself.

APPEARANCE: Appellant, Pro se.

#### OPINION

##### I

On 15 October 1970, when Appellant appeared before the Examiner for the first time he was given proper notice of date and time for continuance, the adjournment having been requested by Appellant.

Appellant's service aboard MANKATO VICTORY, voluntarily

undertaken by him after he knew of the 11 January 1971 date requested by him, is no basis for a finding that he was denied the opportunity to enter a defense to the charges. Since the record reflects that Appellant made no effort to obtain a further adjournment and that the named counsel denied representing him in the matter, this conclusion is doubly reinforced.

## II

In connection with the above, however, I may say that the seeds of trouble, fortunately never brought to fruition, were planted. It is not entirely clear what the background of the events of 24 September 1970 was. If the Investigating Officer at the time of service of charges on 21 September 1970 agreed with Appellant to request a postponement he had clerally nullified the efficacy of his notice to appear on 24 September. If the Investigating Officer and the Examiner, with no prior promise to Appellant, had agreed to the adjournment to 15 October 1970, without having commenced proceedings under the in absentia procedure on 24 September 1970, they had combined to nullify the notice.

The potential error was adverted when Appellant appeared personally on 15 October, but the possibility should not have been permitted to arise.

## III

A word may be said as to the propriety of the order of revocation in this case. The matter was Appellant's seventh brush with R.S. 4450 action in 19 years, his sixth in seven years, his fifth in less than five years, and his fourth in three years. A glance at the Table at 46 CFR 137.20-165 indicates immediately the propriety of the order, especially since, at the time of the order, Appellant was already under an order of twelve months' suspension -- the closest one usually gets to revocation with actual revocation.

It may be further said that the Examiner made a perceptive observation in his opinion:

"There is no evidence in mitigation, and there is nothing in this record to justify less than the average order provided [in the Table]."

Except when the Table specifically recognizes an order of probation as acceptable, it is apparent that probation as an appropriate order is something of which an examiner should be affirmatively persuaded. The same is true of an order less than average under

the Table. When a person does not appear for his own hearing, it is difficult to see how less than average orders can be justified.

ORDER

The order of the Examiner dated at San Francisco, California, on 25 January 1971, is AFFIRMED.

C. R. BENDER  
Admiral, U. S. COAST GUARD  
COMMANDANT

Signed at Washington, D. C., this 16th day of March 1972.

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### Notice

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